NO. 2596

In the

United States
Circuit Court of Appeals

For the Ninth Circuit

PACIFIC COAST COMPANY,
A Corporation

Appellant,

vs.

GEORGE E. JAMES and EDWARD WEBSTER,

Appellees

Brief of George E. James, Appellee

Upon Appeal from the District Court for the Territory of Alaska, Division No. 1

GUNNISON & ROBERTSON,
ROYAL A. GUNNISON,
Attorneys for Appellee

Filed this _____ day of November, 1915

_____ Clerk

By _____ Deputy

ERRATA

Page 18, line 24, change "warfinger" to "wharfinger.".

Page 21, line 22, change period to comma, make small a in "and".

Page 22, line 21, should read "any part thereof" instead of "any part of".

Page 30, line 19, word "it" should be "its".

Page 38, line 28, word "of" should be "or".

Page 39, line 6, strike one of the words "right".

Page 43, last line, change word "diversed" to "divested".

Page 54, line 29, strike out words "prior to".

Page 55, line 26, should be stricken, and between lines 27 and 28, insert "that is, 40 feet on each side of the center. No part".

Page 56, line 6, change "testfies" to "testified".

Page 56, line 13, change word "Appellent" to "Appellee".

Page 57, line 7, change "meane" to "mesne".

Page 64, line 14, after word "such", insert word "kind".

Page 68, line 15, period should be substituted for comma.

Page 69, line 2, word "adversed" should be "adverse".

Page 72, line 18, omit word "or".

Pages 76-77, the last word on page 76 and the first word on page 77 should be "constitutes".

Page 77, line 16, word "at" should be "as".

Page 77, lines 25-26-27, should read "and in April, 1900, "when James first went upon this tract and began his use, etc."

Page 81, lines 4-5-6 should read "every action shall be "prosecuted in the name of the real party in interest, except "as otherwise provided in Section 859, * * * (C. L. A. 1913, Section 857).

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No. 2596

Brief of GEORGE E. JAMES, Appellee

Upon Appeal from the District Court for the Territory of Alaska, Division Number One

In this suit, Appellant seeks to enjoin the Appellee, George E. James, from constructing certain additional improvements on tidelands at the southern end of the City of Juneau, Alaska. The

real solution of the controversy is to be found in the interpretation of Sec. 8, of Chap. 53, (23 Stat. L. 26) being the Act of Congress approved May 17, 1884.

In its brief, Appellant contends that it has a title to tideland, inlcuding the 113 feet in question, which is tantamount to a fee therein and that by virtue thereof it may hold the tract in question by constructive possession. At one point it seems to contend that this title is derived from the Government by adverse possession under color of title, and at another, its contention seems to be that on and prior to May 17, 1884, it was in possession of one part of a larger tract of tideland, within which larger tract was included the 113 feet in question, and that because of such possession at that time, it now stands with regard to the tract in question in the situation of an owner in fee.

On the other hand, we think it clear that Appellant has not and cannot obtain a fee therein or any right or title resembling a fee and that there are but two methods by which Appellant can have any right to use or occupy tidelands in Alaska; namely: By reason (*a*) of actual use, occupancy, possession and claim of the particular tidelands on May 17, 1884, which actual use, occupancy, possession and claim have been continuously maintained up to the time of the alleged interruption, or (*b*) of being the abutting upland proprietor.

Appellee contends that the facts as shown by the evidence must lead to the following: (1) That

appellant never, at any time, *actually* used, occupied, possessed or improved the piece of tideland in controversy; (2) That even if it could be said ever to have had any kind of possession thereof, it abandoned that possession many years before Appellee entered upon the tidelands; (3) That the only right Appellant ever had in the tidelands in question was the littoral right as the abutting upland owner; (4) That Appellant by its own acts divested itself of these littoral rights.

STATEMENT OF CASE

The statement of the case, contained in Appellant's Brief, we conceive to be incorrect as to the deductions from and summary of the evidence, and therefore this statement of the case is made as we conceive it to be.

The original suit was in the nature of a bill in equity brought August 15, 1913, by Pacific Coast Company, a corporation, against George E. James and Edward Webster, in the First Division of the District Court for the Territory of Alaska, to restrain defendants from erecting certain structures on the shore of Gastineau Channel, an Arm of the North Pacific Ocean, (Rec. p. 5) IN FRONT OF THE PROPERTY OF PLAINTIFF, and particularly IN FRONT of "Blocks R, S and T, of Juneau "Townsite and within the boundaries of the location "of the said M. W. Murray, made on the 6th day of "March, 1881." (Rec. pp. 1-6.) The defendant

Edward Webster filed a disclaimer (Rec. p. 7) of any interest or claim of interest and the evidence discloses that he had no interest in the controversy, but, no order was entered with reference to Webster.

The other defendant, George E. James, Appellee here, answered and filed a cross-bill (Rec. p. 9) praying (Rec. p. 17) that the Pacific Coast Company, Appellant, be enjoined from disturbing his "possession, use and occupancy" of the tract of land and from erecting piling or other structures or mooring any kind of vessel or craft, in front of or upon the property in controversy and praying further that "upon final hearing, defendant (George E. James) "be adjudged to be the owner and in possession and "entitled to the possession of said premises."

In the cross-bill it was alleged among other things (Rec. pp. 15-16):

> "That prior to the commencement of this "action plaintiff by various certain formal "conveyances deeded to the Town of Juneau "and dedicated to said town and the public "as a public street, road or highway, a strip "off the westerly portion of Blocks R, S and "T, abutting on the line of mean high tide "and further dedicated other portions of "lots and blocks as public streets, roads "and alleys; that said conveyances and "dedications have been accepted by said "town; that by said acts the said plaintiff "cut off, abandoned and parted with and

"divested itself of any and all littoral and "riparian rights, if any it ever had, and "any right or privilege of access to or from "deep water from said upland across the "tidelands herein described (i. e., the "tidelands in controversy) and thereby "estopped itself from claiming any such "right, title or interest in or to or right of "access across, said herein described "tidelands."

In its reply (plaintiff) Appellant (Rec. p. 20)

"admits that it deeded to the City of "Juneau, a certain strip of ground from "the westerly portion of Blocks R, S and "T and further admits that it conveyed "certain portions of said lots and blocks "as public streets, roads and alleys; that "said dedications have been accepted by "the Town;" The other allegations as to abandonment are denied.

Another allegation of the defendant's cross-bill (Rec. p. 16) is that before the commencement of the suit, plaintiff company,

"attempted to and did part with, sell and "convey to other persons, not parties to the "action any and all right, title and interest "in the tidelands and other lands described "in the complaint and cross-bill, of which "said plaintiff in said complaint alleges "itself to be the owner, and that plaintiff

"is not now and was not at the time of the "commencement of this action the real "party in interest, it having theretofore "parted with and divested itself of what- "ever right or claim of right to or interest "in the said property it may at any time "have pretended or claimed to have had "therein." This allegation plaintiff denies in its Reply. (Rec. p. 20.)

At a preliminary hearing on an order to show cause, the Appellee, James, was left in possession of the premises, but both parties were enjoined from driving piles or erecting structures on the tidelands in controversy. The trial on the merits on July 17, 1914, resulted in a final Judgment and Decree for the Appellee, James, (Rec. pp. 34 et seq.) adjudging and decreeing him to be the owner and entitled to the possession of the tidelands in issue, and (Rec. pp. 35-36) restraining and enjoining the plaintiff, Pacific Coast Company,

"from asserting any right, title or interest "in or to those premises or any part "thereof" and "forever enjoining and "restraining it, the plaintiff company "from in any manner or form whatsoever, "obstructing, interfering with or hindering "the full and complete use, occupancy, "possession and enjoyment by the defend- "ant, George E. James, his agents, servants " and employees or his successors or

"assigns of the premises hereinbefore "described as belonging to him the said "George E. James, or with his or their right "of access, thereto and therefrom to the "deep and navigable waters of Gastineau "Channel."

This judgment was based upon Findings of Fact and Conclusions of Law (Rec. pp. 29-34) made in conformity with the written memorandum of decision of the Court, (Rec. pp. 23-29). Appellant assigns as error (Rec. pp. 818-834) each of the five Findings of Fact and the Conclusions of Law (Rec. p. 33) and the Court's refusal to adopt its thirteen requests to find.

The subject of the suit is (Rec. p. 35)

"a certain tract of tideland in the Town of "Juneau, Alaska, being 113 feet along the "line of mean high tide in front of lots One "(1) and Two (2) in Block T, and part of "Lot One (1) in Block S, as follows: that "is to say:

"The full width of Lots One (1) and "Two (2), Block T, being 100 feet more or "less, and the 13 feet of Lot One (1) in "Block S, which is contiguous to said 100 "feet and extending from said line of mean "high tide the full width of said 113 feet "out to the navigable waters of Gastineau "Channel, an arm of the North Pacific "Ocean.

THE FACTS

The following is a brief, but correct statement of the facts disclosed by the record.

1. That in 1881 a notice of location was filed claiming certain tidelands and uplands together, the tract claimed being 600 feet square. (Plaintiff's Exhibit No. 1 Rec. p. 610).

2. That neither Murray nor any one representing him went into possession of the tract at the time.

3. That the Appellant, a transportation company operating a line of steamboats, in 1881 and 1882, built a wharf on the center of this tract of tideland, and that the most southerly point of the wharf, the nearest part to the ground in controversy, was over 140 feet from any point of the 113 feet in issue here. (See Testimony of Webster, Rec. pp. 66, 86, 241, 366, 377, also Wells, Rec. pp. 87-88-90-91).

4. That there were no improvements made upon this 113 feet by anyone at any time prior to 1900. (See testimony of Webster 66-86-366 et seq. George E. James, Rec. pp. 407 et seq. Sam Kohn, Rec. pp. 187-188; Chas. Biernoth, Rec. 153 et seq.)

5. That the docking of the Appellant's vessels at the wharf in the center of the 600-foot tract, and occasional mooring of a head or a stern line ashore, even if that line extended over a part of the 113 feet, to a stump or post, did not constitute a use, occupancy or possession of the tideland, but was the exercise of

the littoral right of access from deep water to the upland. (See Testimony of Edward Webster, Rec. pp. 66, 86; C. W. Wells, Rec. pp. 88, 97; J. C. Hunter, pp. 725, 727 et seq.)

6. Appellants acts in docking its vessels at this wharf did not constitute either use or occupancy or possession of the tidelands. The vessels lay in the deep water, not over the tidelands. (See Testimony of Webster, Rec. pp. 66 et seq. and 241, 366; Capt. Hunter, Rec. pp. 722 et seq.; Capt. Lloyd, Rec. pp. 116 et seq. and 784 et seq.

7. That in 1887 Edward Webster, then wharfinger for Appellant in charge of this wharf, drove a couple of piles near the line of high tide where the southeasterly limit of the 600 feet of tideland claimed which is practically co-incident with the southeast limit of the 113 feet, crosses the line of mean high tide and this was all that appellant ever did to improve this particular 113 feet. (See Testimony Webster, Rec. pp. 71,72.)

8. That in 1892, Appellant built a new wharf some half mile distant and when it was completed in August, 1894, transferred its business to the new wharf, and with the exception of the docking of the S. S. Al-Ki, at the old wharf, in 1895, it was never again used as a wharf. (See Testimony Webster, Rec. pp. 76-77, 82-83; Wells, Rec. p. 94.)

9. That the old wharf was permitted to go to decay and ruin and up to August 15, 1913, had never been repaired by Appellant. (See Testimony Web-

ster, Rec. p. 82; Casey, Rec. pp. 204-5; James, Rec. pp. 407 et seq.; Ross, Rec. pp. 219-220; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; W. F. Swan, Rec. pp. 264-266.)

10. That the structures on the inshore end of the approach were occasionally leased by various persons as a sardine factory, a tannery and glove factory and a tenement. (See Testimony James, Rec. pp. 407 et seq.; Webster, Rec. pp. 166 and 241 et seq.; Roberts, Rec. pp. 174 et seq.; Casey, Rec. pp. 201 et seq.)

11. That for six years, from 1894 to 1900, there was no act of any kind on the part of Appellant or any one acting under or for it, with reference to this 113 feet. (See Testimony James, Rec. pp. 407 et seq.; Webster, Rec. pp. 66, 241 and 366 et seq.; Wells, Rec. pp. 87 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. p. 174.)

12. The tract claimed as described in Murray's location notice, was 600x600 feet, and extended from low water mark (Plaintiff's Exhibit 1, Rec. p. 610) 600 feet to inshore and upland. The same description of the tract was contained in "Parcel III" of the deed from Waterbury and Coolridge to Appellant (Plaintiff's Exhibit 17, Rec. pp. 659, 664) and also in the deed (Plaintiff's Exhibit 13, Rec. pp. 644, 647) from Thomas R. Lyons, Townsite Trustee to Waterbury and Coolridge, and yet every plat in evidence (Plaintiff's Exhibit 20, Rec. p. 768), and the plat attached to Captain Lloyd's description (Plaintiff's witness) Rec. p. 804, shows,

that the 600 feet has been moved upland and that the tract on the upland exclusive of the tidelands is now more than 600 feet on its side lines.

13. That on or about April 15, 1900, when Appellee went upon the 113 feet in question, Appellant, if it had ever had any right thereto had long before abandoned it, and it was open, unused, unimproved and unoccupied tidelands of the United States. (See Testimony James, Rec. pp. 407 et seq.; Biernoth, Rec. pp. 153 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; Ross, Rec. pp. 215 et seq.; Bach, pp. 391 et seq; Webster, Rec. pp. —.

14. That Appellee began at once to improve the tract by clearing drift wood and boulders from it, and to use it by landing upon it rafts of lumber and to occupy and possess and claim it. (See testimony from record last cited.)

15. That Appellee continued to use, occupy, possess and claim it, as a landing place for his rafts and scows of lumber, as a place to lay up various sorts of craft and vessels for repair and winter, improving it from time to time, and in 1904, 1905, 1907, 1908, 1911 and 1912, placing substantial piling and other structures thereon which he maintained, kept in repair and continuously used in his business of a sawmill operator, for delivering his product at Juneau. (Testimony James, Rec. pp. 407 et seq.; Biernoth, Rec. pp. 153 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; Ross, Rec. pp. 215 et seq.; Casey, Rec. pp. 201 et seq.; Webster, Rec. pp. 241,

366 et seq.; Scott, Rec. pp. 305-308; J. R. Mitchell, Rec. pp. 756 et seq.; T. A. Harper, Rec. pp. 774 et seq.)

16. That Appellant knew of his use, possession and occupancy and of the erection of his improvements thereon, during all the time from 1900 on, yet never ordered him off, never warned him of its claim of ownership or made any attempt to prevent his use, occupancy or possession or improvement thereof, until just prior to Aug. 15, 1913, when this suit was begun. (See Testimony James, Rec. pp. 407 et seq.; A. S. Dautrick, Rec. p. 355; W. F. Swan, Rec. p. 275; Ewing, Rec. p. 362.)

17. That the permission given to Mr. Messerschmidt to land cord wood over this tract was permission to exercise their littoral right only. And Messerchmidt so used it, placing his wood above the line of the June tides, i. e., the high, high tides. (See Testimony Dautrick, Rec. pp 339, 342, 355; G. H. Messerschmidt, Rec. pp. 528-530, 540-546.)

18. That the lease to Receiver Davidson was the exercise of a littoral right as disclosed by the preamble of the lease, and that use by the Receiver was not to the exclusion of nor hostile to the defendant, and was at best only casual and temporary, and the materials in the structure which were not washed away were taken down and hauled to the Perseverance Mine, in the Silver Bow Basin. (See Testimony of J. R. Mitchell, Rec. pp. 754, 762-763. See Plaintiff's Exhibit No. 22, Rec. p. 687.)

19. That no taxes were paid by Appellant on any of the 600-foot tract, the wharf site, prior to 1901, and those paid since are not evidence of use, occupancy, possession or improvement of the 113 feet in question. (See Testimony of Dautrick, Rec. pp. 356-356; Ewing, Rec. pp. 364-365.)

20. That both by admissions in its reply and by its dedication to the City of Juneau, as shown by the evidence, the strip of tidelands along and covering the line of the lots abutting on mesne high tide, as a public street, Appellant cut off its littoral rights in this 113 feet, many months before the commencement of this suit. (See Defendant's Exh. C, Rec. pp. 716-720.)

21. That by deeds and contracts of sale to Mr. Messerschmidt and Mr. Gemmett, all made prior to the commencement of this suit, Appellant divested itself of any right to maintain this suit. (See Defendant's Exh. "B," Rec. p. 713; Plaintiff's Exh. 24, 26-27, Rec. pp. 693, 699, 704.)

22. That Appellant had used the wharf twelve years and had discontinued its use for four years, a period of some sixteen years in all, when the deeds of Waterbury and Coolridge to Appellant were made. (See Testimony Webster, Wells, Hunter, James, cited above, and Plaintiff's Exhibit 17, Rec. p. 659.)

23. That Appellee will be irreparably damaged if Appellant is allowed to erect structures between his gridiron and deep water.

DISCUSSION OF FACTS.

On or about March 12, 1881, there was filed in the Harris Mining District a notice whereby one M. [illegible]. Murray claimed to locate a tract of land six hundred feet square, the westerly line of which was claimed as extending 600 feet along the line of low water, and the side lines to extend inland from low water, 600 feet. The notice refers to but two corner posts and those at low water. The only monument was what was called (Rec. 610) in the copy of the notice "a blazed tree and notice and large boulder near low water line."

The minutes of a miners' meeting of Rockwell, the town now known as Juneau, held some three weeks later, contains resolutions reciting that Murray had located "outside" of the City,

> "a wharf site, and proposes at earliest oppor-
> "tunity to build a wharf and warehouse
> "for the accommodation of vessels and
> "steamers, and for the benefit of all cit-
> "izens alike. It is the sense of this meet-
> "ing that we should encourage such an
> "enterprise; therefore it is hereby resolved that
> "the miners and citizens of this District and
> "City, recognizing that such improvements
> "would be a public benefit, hereby accept, en-

"dorse and recognize the rights of said Captain "Murray and will by our future acts endorse "and recognize his rights to*said wharf site* and "improvements." (Rec. pp. 612-13.)

It is pointed out that the only rights Murray then could have had were by virtue of actual possession, use and occupancy, for there was then no law in Alaska with reference to the disposal of the public domain or the soils under the tide. There is no evidence that Murray or any one acting for or under him ever, either then or at any other time used, occupied or possessed this ground in controversy. At this time, all vessels calling at this port discharged upon scows or small boats as there were no wharves there.

In the fall of 1881 and 1882, a wharf was constructed at the center of the 600-foot tract by the Appellant. There is nothing in the evidence to show that Murray had anything to do with it. The inshore end of the approach was on piling, and was about 16 feet wide and about 140 feet in length. The wharf was "T" shaped, with a face of 80 feet and a depth of 40 feet (Rec. pp. 68-69). The warehouse was on the foreshore and the center stake of the 600-foot tract claimed was directly under it. (Rec. p. 70.) Thus the wharf and warehouse were upon the center of the tract and extended only about forty (40) feet on either side of the center line. The vessels of the Appellant (which was the only transportation company whose vessels called at the port of Juneau at this time) began using this wharf at this time and

thereafter Appellant managed and used the wharf up to August, 1894, when its use as a wharf and wharf-site, for which purpose it is claimed it had been originally taken up (Rec. 610) was discontinued and Appellant transferred its wharfage business to its new structure at the foot of Main street in the Town of Juneau. But once thereafter did a vessel land at the old wharf and that was in 1895 (Rec. pp. 76-77).

It was contended by Appellant on the trial and now, that, beginning in 1882, these vessels in landing at this wharf, projected far over either end of the face of the wharf, but even if they did, the evidence is that they did not project over the 113 feet of tide land in controversy. (See Testimony of Capt. Hunter, Rec. pp. 722, 741; Webster, Rec. Rec. pp 66, 86.) It is also contended that they made fast by carrying bow and stern lines ashore and tieing to piling set at the northwesterly and southeasterly lines of the property at or near the line of ordinary high water. Wells says the vessels used stumps as well as piles. (Rec. pp. 91, 98.) It is asserted by the witness Wells that the piles were put in in 1882 at his suggestion to mark the boundary of the tract and that the vessels also used them as moorings. This the Warfinger Webster denies. (Rec. pp. 71-73.) But Captain Hunter, (Rec. pp. 722-741) and Lloyd (Rec. 116, 784) said that the vessels only moored that way when the weather was bad and that such was not the practice. Neither of them testified definitely to the using of piles for mooring, but stated that the lines

were carried *ashore* and moored to any *permanent* object. Webster, who was wharfinger on the old wharf from the spring of 1885 to 1894, when it was abandoned as a wharf, says there were no such piles as testified by Mr. Wells, when he Webster went there, but that in 1887, he did drive a couple of pile at each end of the tract just at medium high water. (Rec. pp. 71-72.)

The 113 feet, which are the subject of this suit, are the most southeasterly part of the tract claimed, on the opposite side of the wharf from the town and the only improvement ever placed upon any portion of this 113 feet at any time whatever by Appellant or anyone else other than Appellee consisted of two piles. (Testimony Webster, Rec. pp. 71-72.) We think the evidence conclusive that these piles were not set until 1887, that up to that time there had been absolutely nothing done with this 113 foot piece of tide land, nor was it occupied or put to any use whatsoever, by Murray or anybody claiming under, by or through him, by Appellant or by anyone else at any time prior to, or on May 17, 1884, when Chapter 53, was adopted. Even if the vessels were moored by lines ashore as claimed, the lines were fastened above the line of high tide (See Testimony Captain Hunter, Rec, pp. 722 et seq,; Wells, Rec. pp. 91, 98), and it was merely the exercise of the right of ingress and egress between navigable waters and the upland, and even this was but

infrequently used. A vessel called during this period but about once each month. (Rec. p. 97.)

The evidence fails to establish any use, occupancy or possession of this 113 feet of tideland on or prior to May 17, 1884.

In August, 1894, the Appellant moved its wharfing business to the new wharf. But once thereafter, i. e., in 1895, did a vessel, the "Al-Ki," dock at that wharf, and then for a few hours only. There is no claim that in so doing she in any way used the 113 feet in controversy. From that time on, the wharf was allowed to go to ruin. It was put to no use whatever. The buildings on the approach were variously used as a herring (sardine) factory, a tannery and glove factory and a tenement. Nothing was done to the 113 feet of tideland in controversy. (Testimony of Roberts, Rec. p. 175; Kohn, Rec. p. 190; James, Rec. pp. 407 et seq.)

Five years from 1895 passed. During these five years neither the Appellant nor anyone else did anything to or with this 113 feet of tideland, neither used it, nor occupied it nor improved it, nor was anyone in possession of it. As the Trial Court says, in its memorandum of decision, (Rec. p. 25) "the said tidelands remained in a state of nature." So far as the 113 feet is concerned, the record is a blank. There were no taxes paid on it. There was no exercise of ownership or dominion over it. Appellant had abandoned it. (See Testimony James,

Rec. p. 407; Roberts, Rec. p. 174 et seq; Kohn, Rec. p. 187 et seq; Webster, Rec. pp. 66-86, 241, 366 et seq.

In April, 1900, this 113 feet was open, unoccupied, unimproved, and unappropriated tideland of the United States. It is true that Appellant in April, 1898, and thereafter, received certain quit claim deeds to a tract 600 feet square, but it had been moved entirely upon the upland as shown by the plats. (Appellant's Exhibit 20, Rec. p. 768, and plat attached to Lloyd's testimony, Rec. p. 804.) Appellant asserts that these deeds conveyed to Appellant the various interests which it is claimed existed in the entire property. This is incorrect, however, as alleged interest of one M. F. Griffin, of Weaverville, Trinity County, California, (Plaintiff's Exhibit 7, Rec. pp. 619-20), has never been conveyed so far as the record discloses. Among the conveyances to the Appellant's grantors was the Townsite Trustee's deed (Plaintiff's Exhibit 13, Rec. pp. 644 et seq.), which, among other tracts, purported to convey to Messrs. Waterbury and Coolridge, the tidelands in front of the upland tract. And which this Court in McCloskey vs. Pacific Coast Company, 160 Fed., 914, held to be void. This tract of tideland so attempted to be conveyed included the 113 feet in controversy.

The evidence fails to show any relation between Appellant and Murray or any relation between Appellant and Carroll or between Murray and Carroll, and yet it does appear from the evidence that during

all this time, Appellant, without title or other right than actual use and possession exercised acts of ownership and dominion over portions of the wharf site, but not over the 113 feet.

The record shows (Rec. pp. 136 et seq.) that Appellant's case in chief closed, with the evidence standing as above stated, with the admission in the pleading of the conveyance and dedication of that portion of upland abutting on the line of mesne high tide to the Town of Juneau as a public street, road or highway and the acceptance by the Town of the said conveyance and dedication of said strip as such public street. There was no evidence of use, occupancy, possession or improvements of any part of even the 600-foot tract, to say nothing of the tract in controversy after 1894. The only evidence of anything thereafter is, to-wit.: (that of the company's agent, Mr. Ewing) to the effect that if the company had this tract in controversy, it contemplated constructing a wharf 600 feet in length. The first deed to Appellant of the 600-foot tract or any part of, was received in April, 1898, four years after its use, occupancy and possession had been abandoned. Defendant thereupon (Rec. p. 136 et seq.) moved for a judgment of non suit. The motion was denied.

The defendant, thereupon proceeded to introduce his evidence in support of his cross-bill (Rec. p. 153), and it was confined to this; i. e., that the tideland was open, that he entered, used, occupied, and possessed it from April, 1900, to the date of this suit.

That evidence discloses that in the spring of 1900, this 113 feet of tideland was open, unappropriated, unoccupied and unimproved tidelands and while plaintiff had not then cut off its littoral rights by the dedication to the Town of Juneau, its admission of that action in its Reply eliminated that issue of littoral rights from the case. Despite this admission, however, Appellee introduced the deed of dedication and the plat (Rec. pp. 716-720). Further on, we shall direct your Honors' attention to certain evidence that shows conclusively that the only claim Appellant made or had to the tidelands in question was by virtue of its littoral rights and not under the Act of May 17, 1884.

In the spring of 1900, Appellee engaged in the sawmill business at a place then called Sheep Creek, now Thane, some four miles south of Juneau, on Gastineau Channel. One of his markets was Juneau and he rafted his lumber from the mill to town. A place where the rafts could be delivered, was necessary at Juneau, so in April (about the 15th) he and an employee named Charles Biernoth, came up with a raft for Juneau. This piece of beach or tideland was unused, unoccupied and unappropriated. It was covered with driftwood, logs and boulders and while advantageously located and generally suitable for his purpose, it was too rough to be used with safety, so he and Biernoth cleared it to make it suitable for use as a landing place for his rafts and lumber. (See testimony of Biernoth, Rec. pp. 153 et seq.; James, Rec. pp. 407-409 et seq.; Kohn, Rec. pp. 187 et seq.; Roberts, Rec. pp. 174 et seq.; Casey, Rec. pp. 205 et

seq.; Bach, Rec. pp. 391 et seq.; Lund, Rec. pp. 226 et seq.; Ross, Rec. pp. 215 et seq.; Webster, Rec. pp. 241, 366, et seq.)

His practice was to go to the beach there with the raft at high water, moor it and wait for the ebb tide, when the lumber was hauled away by teams. From that time on until the day of the suit, Appellee, having in the meantime transferred his saw mill operations to Douglas, on the side of Gastineau Channel opposite Juneau, openly appropriated, occupied, used and improved, and held possession of this 113 feet for the purpose of a landing place for lumber for the Juneau trade. His possession was never disturbed. He was never ordered off, nor was any objection made by Appellant to his use, occupancy and improvement of this ground, though the company's agents, covering practically the whole time from 1900, each testified that he knew James was in possession of and using, and occupying the ground. The use, occupancy, possession and improvement of this tract by James during this period stands uncontradicted and unquestioned. Each year he cleared more of the rocks and boulders, making the tract more suitable for the purpose for which he was using it. Rafts and scows were beached in there regularly in the summer and in the winter, craft of Appellee were laid up there. In the spring of 1904, he drove some piles (Rec. p. 415) for the purpose of tying up scows to them. In the spring of 1905, he built a small gridiron (Rec. p. 417) on the tract, near the piles in order that the scow might lie

level. The gridiron was about 18 or 20 feet long and in bents four piles wide. (See the plat Defendant's Exhibit "A," Rec. p. 710.)

About the same time one Charles E. Davidson, the receiver of a sawmill business in Wrangell, went on this tract near where the defendant was building his gridiron, and built a platform upon set piles, for holding lumber. (Rec.. p. 420 et seq.) This platform collapsed and was rebuilt, a few piles being driven along the seaward side, but it was again wrecked by the high tides and such timber as remained was hauled to the Basin by the Perseverance Company, to be used there. (Testimony of James, Rec. pp. 465-477; Davidson, Rec. p. 576; Mitchell, Rec. pp. 754 et seq.) Appellant asserts that this action of the Receiver Davidson, constituted possession for it, as a lease was executed to him. To this lease and the so-called Davidson occupancy, we will advert later.

The Davidson platform did not interfere materially with the Appellee's use of the ground. During that summer, Appellee cleared more of th ebeach and opened a roadway down to his gridiron and the place where he landed his scows (Rec. p. 421). This road extended from the inshore end of the old wharf to the gridiron.

In the early spring of 1906, only Appellee's small gridiron was upon the 113-foot tract and during that season Appellee built a new gridiron and platform on it, using a part of his old gridiron (Rec. p. 423 et seq. See also Defendant's Exhibit "A," Rec. p. 710). This

was a more substantial structure than the other. In October and November, 1906, the Town of Juneau extended Franklin street, partly on upland and partly on tideland. This street has at all times since been used as a public street on past this tract. Early in the following spring Mr. James built an approach from the street down to the westerly side of his gridiron. This approach was built entirely on the 113 feet (Rec. p. 428; See Defendant's Exhibit A, Rec. p. 710), except a small "V" shaped piece which stood upon ground claimed by Appellant. This "V" shaped piece was built with the verbal permission of Mr. Swan, Appellant's agent. (James, Rec. pp. 428-429.) Appellee continued to use, occupy and possess the tract, delivering lumber there during the springs, summers and falls and laying up his scows, pile drivers and boats in the winters as he had done. In the spring of 1912 he built the easterly approach to the gridiron, most of it being on the tract. In the early summer of 1913, Appellee again began making improvements upon the tract when this suit was begun.

During all this time from 1894, on, to the date of the suit, the old wharf was put to no use whatever. In 1900 it was in ruins and a portion of it had collapsed. From time to time other portions gave way and no repairs were made. The evidence discloses but two claims made on the part of Appellant, of having put the tract in controversy to actual use, aside from the mooring lines above.

A witness for Appellant, G. H. Messerschmidt, testified that in 1900 he asked permission of the agent of Appellant to put cord wood on the beach. His testimony shows, however, (Rec. p. 530) that it was not on the beach but on the upland out of reach of the June tides (i. e., the high tide of the year). He said "it was on dry land practically" (Rec. p. 530). Thus it is seen to be the exercise of a littoral right only. It is to be observed that Messerschmidt is one of the persons to whom Appellant attempted to sell part of this tract.

The other use claimed by Appellant is that of the Receiver Davidson. An examination of the lease (Plaintiff Exhibit 22, Rec. p. 687) will show that at that time, July 1, 1905, Appellant was not claiming by virtue of possession of the tidelands under the Act of May 17, 1884, or by adverse possession under color of title. This lease is executed with all formality, by the Vice-President and Assistant Secretary under the corporate seal. These two recitals in the preamble:

> "Whereas, under the permission and license "of the party of the first part, the party of the "second part, has erected a platform and pilings "*upon tidelands in front* of lots one and two in "Block T of the townsite of Juneau, Alaska; and
>
> "Whereas, the said party of the first part is "the *owner of the upland upon which said tide-* "*lands abutt* and *is entitled to the littoral rights* "*thereto;*"

make it clear beyond any question *that Appellant was then asserting littoral rights in the tidelands as the abutting upland owner*, and *not otherwise.* The exercise of this right by Davidson was merely temporary and casual.

Appellant also offered evidence of the payment of taxes on the whole tract in support of its claim. There is no evidence of payment of any tax until after 1901, and no evidence as to payment of taxes on the 113-foot tract in question.

Whatever littoral or riparian right Appellant had was cut off in February, 1913, when Appellant by formal instrument under the hand of its Vice-President and Assistant Secretary and its corporate seal "*dedicated to the use of the public forever, all the streets and alleys*" (Rec. p. 717) shown on the plat (Defendant's Exhibit "C," Rec. p. 716 et seq.) for the plat discloses that *the strip of the upland abutting upon the tideland in question was conveyed and dedicated as a public street.*

APPELLANT'S ASSIGNMENTS OF ERROR.

Appellant's assignments of error go to each of the Court's five Findings of Fact and the Conclusion of Law based thereon, and to the Trial Court's refusal to adopt each of Appellant's fourteen requests for Findings and Conclusions. Appropo of these assignments, the Court's attention is directed to the Appellant's "Exceptions to Findings of Fact and Conclu-

sions of Law, etc.," which appear in Rec. pp. 836-837. There is absolutely nothing therein to call the attention of the Court or counsel to that wherein it is claimed the Court erred, nor do the assignments of error remedy the matter. Without making a more extended and elaborate reference to or discussion of Appellant's omission to more specifically point out the alleged error of the Trial Court, we respectfully submit that an exception of that character to a finding or a refusal to find, is insufficient, as a basis for a review of the evidence.

Webb vs. National Bank of the Republic, 146 Fed., 717, 719.

To enter into a discussion of each assignment of error or of Appellant's statement of what it conceives the facts to be, would extend this brief to unnecessary length in view of the fact that we have already both orally and in this brief set forth in considerable detail, what we conceive to be the facts as shown by the evidence.

APPELLANT'S BRIEF.

Nor do we think that any good or useful purpose would be served by a detailed and separate discussion of the points urged by appellant in its brief, as we are presenting in our argument, what we conceive to be the law which governs this case.

However, before leaving the subject of Appellant's Brief we do desire to point out certain features of Apellant's position as set forth in its brief which we think incorrect.

First, we have no difference with Appellant as to the correctness of the general propositions of law, quite academic in themselves, as stated in its brief, nor in the main, to the authorities cited in support of them ,but we do challenge their application to tidelands and to the facts in this suit as the facts very clearly appear from the evidence.

Again: It is pointed out that Appellant in its primary statement in its brief (pp. 8-9) of what it claims the law of the case to be, *abandons it original position* that it was a successor in interest of the 1884 possessor and now *concedes that whatever use, occupancy, possession or claim* there was of the so-called Carroll-Murray Wharf site, including the tract in controversy *was that of appellant alone.*

Again: Appellant *concedes* (Brief, pp. 8-9)

that there was a difference in the use, occupancy and claim made by it during the period from 1881 to 1894, and that from 1894 to the commencement of the suit. In other words Appellant in its Brief asserts (1) That from 1881 to 1894, it used, occupied and claimed under color and claim of title the *whole* of the wharf site, including the tidelands in controversy and (2) that from 1894 to August 13, 1913, it used, occupied and claimed under color of title the *greater part* of the wharf site. It is obvious therefrom that Appellant tacitly admits that at least from 1894 on, it had no possession of the 113 feet in question unless it can in law be deemed to have had a constructive possession by virtue of what (say for the purpose of argument only) was its possession on May 17, 1884. This of itself is a concession of at least one phase of Appellee's contention, to-wit.: that on April 15, 1900, when Appellee went upon the 113 feet in question, Appellant was not and had not been for many years, at least from 1894, in the actual possession of that portion of the tideland in question. We think that as shown by Appellee's authorities and argument hereinafter presented, if Appellant was not in actual possession, it could not hold the tidelands under constructive possession, for tidelands in the Territory of Alaska are not susceptible of any such holding.

Again: Appellant seems to find great satisfaction in the assertion that Appellee does not claim to have acquired title to the 113 feet by adverse posses-

sion. It seems to us that the reasons why Appellee does not claim title by adverse possession are quite obvious in the light of the evidence. Any claim of title by adverse possession would rest upon an admission (1) that Appellant was once, at least, in possession, entitled to possession and that Appellant was the "true owner" of the 113 feet. None of these propositions do we admit. On the contrary, we deny them in toto and we think that there is no basis in fact as shown by the evidence or in law, for any one of them. Appellee's position is that no one had ever been in possession of this tract and that when he entered it in April, 1900, it was open, unappropriated, unoccupied and unused tidelands; (2) That title to tidelands may be acquired by adverse possession under color of title. We maintain that this is not the law. A discussion of our position thereon will be found later.

Appellee does not claim by virtue of a title to the tideland *BUT* by virtue of *ACTUAL PHYSICAL, APPROPRIATION, USE, OCCUPANCY, POSSESSION* and *PERMANENT IMPROVEMENT* of the 113-foot tract.

That Appellee had that actual physical possession and had had it for many years prior to the commencement of this suit on August 15, 1913, is a conceded fact in the suit. The period only is in controversy. The evidence (See Testimony James, Rec. pp. 407 et seq., and other already cited) shows that Appellee went into the actual physical possession in April, 1900, and has continued in

possession down to the date of the suit. Appellant claims two interruptions in this possession (but not in use) one by Messerschmidt and one by Davidson. Each of these we have already considered sufficiently in our discussion of the evidence. Whatever this Court may conclude as to those two instances, it is undisputed, in fact conceded, that regardless of his use, occupancy and possession prior to the fall of 1905, he has since that time been in the *exclusive, undisturbed, actual, physical, use, occupancy* and *possession* of the entire ground. However we assert that the evidence discloses Appellee's use, occupancy, possession and improvement of the tidelands during the entire period from April, 1900.

Again: The Court's attention is directed to Appellant's statement contained in the last five lines of the second paragraph of page 15 of the Brief, of what it asserts to be the substance of this Court's construction of Sec. 8, Chap. 53, Act of May 17, 1884. This general proposition we discuss hereafter but point it out here as one of the misstatements of the law.

The statement contained in par. 2, of p. 27 of the Brief is on a par for inaccuracy with that on page 15. The statement that until patent has issued the statute of limitations in Alaska, does not commence to run, is of course, correct as a general proposition, but it has no applicability here, for no patent has or will issue to tidelands while Alaska remains a Territory. In this connection, it is again pointed out that Appellee claims not under color of title, but by virtue of

actual use, occupancy and possession, which as heretofore stated it is conceded to have had.

Again: Appellant throughout its entire Brief overlooks the distinction between *public lands* of the United States which are subject to purchase, sale, and patent, and *tidelands* in Territories, which are not subject to purchase, sale and patent. The rules of law applicable to the former, Appellant invariably seeks to apply to tidelands. The great majority of citations in Appellant's Brief, in fact practically all outside of the citations to decisions of this Court are to cases which involve uplands with no reference to tideland holdings at all.

Again: We challenge the inference sought to be presented from the assertion in par. 2, of page 24, of the Brief, that "the testimony is uncontradicted and "the Court decided, that Appellant and its grantors, "used, occupied and claimed the whole wharf site "during the period from 1881 to 1894." In the first place, the evidence does not show nor did the Court decided that "Appellant and its grantors used, etc., "the whole wharf site". There is no evidence that any person, company or corporation aside from Appellant ever used or occupied or claimed to use or occupy the *whole* wharf site. And the Trial Court in its written Memo of Decision stated (Rec. pp. 23-24):

> "There is no evidence that Murray built the "wharf or had anything to do with its building "or that any consent from Murray was obtained.

"In fact, Murray seems to have vanished for "several years, and it was only in 1898, that "plaintiff acquired whatever right Murray had, "if indeed he had any."

"Certain it is, however, that in 1882, the "Plaintiff went into the use and occupation of "the wharf and in the absence of any evidence to "the contrary it must be presumed that *Plain-"tiff* owned said wharf and used and occupied, "that is possessed it, in its own right."

As to the use of the whole wharf site, the only evidence is that vessels lying at the wharf shifted along the face of the wharf, according as they discharged from the "forward" or "after hatch," and that in stormy weather, were sometimes moored by bow or stern lines ashore. And the line was carried sometimes by boat over the tidelands in question sometimes along the shore, to the object to which it was made fast. (See testimony of Wells, Rec. pp. 91-94; Hunter, Rec. pp. 722 et seq., and others already cited).

The Trial Court, referring in its decision to this matter, said (Rec. p. 24):

"Whether these lines were fastened to stumps "or boulders on the shore, or to a pile at LOW "water (the word 'low' is evidently a mistake as "there was no evidence of a pile at low water; "there was some evidence that a pile was driven "as near high water as the pile driver could get) "the evidence is not very satisfactory, but I

"think it is clear that a space of at least 250 to "300 feet on each side of the center line of the "wharf was a necessary adjunct to the use and "enjoyment of the wharf as a landing place for "such vessels as were operated by the plaintiff."

It is respectfully pointed out that this language of the Trial Court is not susceptible of any such claim as that made by Appellant. We think that this use was as the Court said, "*as a landing place*" for vessels, i. e., it was the *deep water of the channel* that was necessary, *not* the *tidelands* and the Appellant may have had the *right of access* from deep water to its upland.

Again: It is clear that "such use, occupation and "claim" from 1881 to 1894 was *NOT* maintained under any color of title since the first deed purporting to convey this tract that passed to Appellant was dated and executed in 1898 (i. e., Plaintiff's Exhibit No. 17, Rec. pp. 659) four years after as the Trial Court finds (Rec. pp. 25-28) the Appellant had abandoned all of the tideland in controversy.

Again: We challenge the correctness of the statement (Brief, last sentence par. 1, p. 26) that "the whole of the premises in dispute were exclu- "sively occupied by Appellant's tenant without let or "hindrance from Appellee." An examination of the evidence of James (Rec. pp. 407 et seq); Davidson, (Rec. pp. 576 et seq.); Mitchell, (Rec. pp. 754 et seq.); Harper, (Rec. pp. 774 et seq.), and others, will disclose that this is not a correct statement but that

Davidson's activities did not exclude James from the tract and that James used the tract during all the time that the Davidson platform was there.

We have thus pointed out some of what we conceive to be incorrect statements of fact and law set forth in Appellant's Brief. The general propositions of law which we believe to be decisive of this suit we have stated in the following pages and in discussing these we shall have occasion to refer again to Appellant's contentions.

Before we close this discussion we desire to repeat that as we understand the law and the evidence in this suit, the crucial and decisive question is in the interpretation of the language of Sec. 8, Chap. 53 (23 Stat. L., 26) known as the Act of May 17, 1884, as to what sort and character of original possession of tidelands is protected thereby and what sort of subsequent possession will entitle a claimant to successfully invoke the protection of the statute.

Appellant's position seems to us to be,

(1) That it was in possession of the entire 600 feet, the 113 feet in controversy being held not by possession, use or occupancy of itself, but by virtue of the use of other and different parts of the tract on May 17, 1884.

(2) That this constructive possession at that time gives Appellant by virtue of the statute a title which is tantamount to a fee in the whole tract of tidelands and entitled it to constructive possession, though, it ceased to actually use, occupy or possess it.

(3) That aside from the title acquired as above, it has, by virtue of an occupancy and use of part of this tract, under a claim of color of title, acquired a title (again tantamount to a fee) by adverse possession.

In this connection it is respectfully pointed out that Appellant, though the evidence shows it alone to have been in possession of the wharf on May 17, 1884, (in fact from 1882 to 1894) now claims to hold by virtue of a series of deeds from persons, who are in no way, or manner, shown by the evidence to have ever gone upon, used, occupied or possessed either the whole or any part of the wharfsite, not to mention the 113 feet in question. In other words, while appellant appears by the evidence to have been the sole user, occupant and possessor and claimant of the wharf, it also seems to be attempting to build up a paper title to a larger tract from persons, who are not in any way shown to have had any connection whatever with the land in controversy. We believe all three contentions to be fallacious.

However it seems clear that the true rule is that tidelands in Alaska may be held *only*,

(a) By virtue of having on May 17, 1884, been in actual use, occupancy and possession of the claimant, such actual use, occupancy and possession having since been actually maintained either by the original user of by the tacking of subsequent uses.

(b) By virtue of an easement resting in the proprietor and owner of the abutting uplands.

(c) By actual use, occupancy, improvement and possession, established at any time and maintained.

These propositions we think abundantly sustained by the authorities. Thus if Appellant was the original user on May 17, 1884, it abandoned that right right in 1894, and proceeded on the theory (as shown by the evidence) that as the proprietor of the abutting upland, it had an easement over the foreshore. But of this right, Appellant prior to beginning the suit, divested itself by a conveyance and dedication to the city as a public street of a strip of upland abutting on the tidelands in controversy.

In support of these propositions we now respectfully direct the Court's attention to our points, authorities and argument, as follows:

POINTS.

I.

There can be no fee in the tidelands in the Territory of Alaska, and Chapter 53, Sec. 8, 23 State. L. 26, (C. L. A. 1913, p. 144) being the Act of Congress approved May 17, 1884, though appliable to tidelands, as well as public lands in Alaska, does not change or modify this rule, but its purpose and effect is merely to protect "Indians or other persons" from being disturbed "in the possession" of any lands actually in their use or occupation or now (i. e., May 17, 1884) claimed by them.

II.

The possession of tidelands which is protected by the Act of May 17, 1884, (Chap. 53, Sec. 8, 23 Stat. L. 26) is the original actual possession on that date which has since been actually and continuously maintained by the original 1884 occupant or by him and his successors down to the moment of the controversy. Constructive possession will not satisfy the requirement of the statute.

III.

The acts of Appellant or of Appellant and its predecessors if any it ever had, on May 17, 1884, or at all, insofar as the 113 feet herein controversy are concerned, did not constitute actual use, occupancy and possession of the tidelands within the requirement of the statute.

IV.

Title to TIDELANDS IN ALASKA, may not be acquired by adverse possession under color of title, as

(a) Title to the tidelands is in and held by the United States, in trust for the future State and the United States will not dispose thereof, except for appropriate purposes, such as for the confirmation of a grant by the ceding nation, or in the performance of an international duty or in case of some public exigency.

(b) Title by adverse possession ripens into a fee and consequently, title can be so acquired only in lands of the United States which are susceptible of being sold and patented; i. e., in public lands of the United States;

(c) Tidelands in Alaska are not public lands and may not be sold nor fee in them passed except as specified in subd. (a) hereof; therefore no possession of tidelands in Alaska can ripen into a fee against the United States or the future state.

(d) Before a person's possession of a given tract of land can be deemed to be adverse, so that the maintenance of that possession for the period prescribed in the statute of limitations, will ripen into a fee, there must be another and an original and resisting possession of the identical tract by another person claiming to be the "true owner", to which the new claimants possession is opposed, that is to say, adverse. The "true owner" of the tidelands in question has always been the United States; therefore Appellant never could have acquired, nor did it acquire a fee by any occupancy or possession by itself or its predecessors, if any.

(e) There can be no color or claim of title to tidelands in Alaska, inasmuch a sthe title thereto is in the United States; the rule as to color and claim

of title being applicable only to lands to which fee title may be acquired and which are subject to be held by prescription. A notice of location of tidelands is not color of title.

(f) The deed of the Townsite Trustee, purporting to convey to appellant and its grantors, title to soil in Alaska covered and uncovered by the flow of the tide, i. e., a large tract of tidelands including that piece in controversy, was ineffective as to tidelands, as Appellant "could thereby take nothing below the "high tideline for the 'government had not parted "with its title."

V.

Possession of tidelands being susceptible of transfer may also be abandoned.. The acts of Appellant constitute abandonment.

VI.

Tidelands which are open, unappropriated, unused, unoccupied and unimproved may be appropriated, used, occupied, possessed and improved, by any person, subject always, (1) to the control of the United States, under its constitutional rights to protect and regulate commerce and navigation; (2) to the dominion, sovereighty and ownership of the future state; and (3) to any existing littoral right.

VII.

Appellant having abandoned any possession of this 113 feet which it ever had, could have no other rights therein or thereover, that were incident to its ownership, if it was the owner, of the abutting upland, that is to say; the littoral right or right of access to and from the deep and navigable waters of Gastineau Channel; but this is not a title to the soil below high water mark. It is merely and only an easement.

VIII.

An owner of upland abutting upon navigable waters, may convey away and divest himself of his littoral and riparian rights; and appellant's deed and dedication of a strip of upland abutting on the line of mesne high tide along the 113 feet of tidelands in controversy, without reservation and forever, to the City of Juneau, as a public street, divested appellant of all its littoral and riparian rights and easement of access between the upland and the deep and navigable water across the tideland in controversy.

IX.

Appellant having thus abandoned whatever possession of the tidelands in question it may have had, if any, and having diversed itself of its littoral

and riparian rights across the foreshore, is without any right to bring this suit.

X.

Even if Appellant had had any other right or interest in these tidelands in controversy, which might have been the subject of this suit, Appellant was not the real party in interest, nor the proper party to bring this suit, as prior to August 15, 1913, it had executed deeds and conveyances and contracts for deeds and conveyances of the foreshore in controversy.

ARGUMENT.

POINT I.

There can be no fee in the tidelands in the Territory of Alaska; and Chapter 53, Sec. 8, 23 Stat. L. 26, (C. L. A. 1913, p. 144) being the Act of Congress approved May 17, 1884, though applicable to tidelands as well as "public lands" in Alaska, does not change, or modify this rule, but its purpose and effect is merely to protect "Indians or other persons from being disturbed in the possession" of any lands ACTUALLY in their use or "now" (i. e. May 17, 1884) claimed by them.

Appellant has in this case, based all its argument, in fact its case, upon the theory that the same rules of law apply to tidelands as to the upland. We thinks the

true rule entirely to the contrary. The Supreme Court of the United States in Mann vs. Tacoma Land Co. 153 U. S. 273 (38 L. Ed. 714) says that

> "land alternately covered and between the dry "upland and the navigable water is land which "may be used in facilitating approach to navig- "able waters from the uplands and is strictly "within the description of "tideland."
>
> 8 Enc. of U. S. Sup. Ct. Reports 812,
>
> *Baer vs. Moran Bros. Co.* 153 U. S. 287-288, 38 L. Ed. 718.
>
> *Walker vs. Harbor Com.* 87 Wall. 648, 21 L. Ed. 744.

The tract in controversy in this case is tideland and for that reason has special value to Appellee since it is desirable for use in facilitating approach from navigable water to the upland.

Tidelands and title thereto have long been the subject of consideration by the Courts of England and this country. And so far as the doctrine of title to tidelands in Territories of the United States is concerned, it was settled by the U. S. Supreme Court in Shively vs. Bowlby, 152, U. S. 1, 49 and 50, where the Court said:

> "The Congress of the United States, in disposing of the public lands, has constantly acted upon the theory that those lands, whether in the interior, or on the coast, *above* high water mark, may be taken up by actual occupants, in order to encourage the settlement of the country, but

that the navigable waters and the soils under them, whether within or above the ebb and flow of the tide, shall be and remain public highways; and, being chiefly valuable for the public purpose of commerce, navigation and fishery, and for the improvements necessary to secure and promote these purposes, shall not be granted away during the period of territorial government; but unless in case of some international duty or public exigency, shall be held by the United States in trust for the future States, and shall vest in the several States, when organized and admitted into the Union, with all the powers and prerogatives appertaining to the older States in regard to such waters and soils within their respective jurisdictions; in short, shall not be disposed of piecemeal to individuals as private property, but shall be held as a whole for the purpose of being ultimately administered and dealt with for the public benefit by the State, after it shall have become a completely organized community."

The fact that the Territory of Alaska was acquired by the United States by treaty from Russia does not change the situation for "every nation acquiring "territory by treaty or otherwise, must hold it, sub- "ject to the Constitution and Laws of its own "Government."

Pollard vs. Hagan, 3 How. 212, 225.

And "the title and dominion passed to the "United States for the benefit of the whole peo-

"ple, and in trust for the several states to be "ultimately created out of the Territory."

Shively vs. Bowlby 152, U. S. 1, 57.

The Supreme Court in the case of Pollard vs. Hagan cited above and decided in 1845, then laid down the following as the law of tidelands:

First: "The shores of navigable water and "the soil under them were not granted by the "Constitution to the United States, but were re- "served to the States respectively."

Second: "The new states have the same "rights, sovereignty and jurisdiction over this "subject as the original states."

Third: "The rights of the United States to "the public lands and the power of Congress to "make all needful rules and regulations for the "sale and disposition thereof, conferred no "power to grant to the plaintiffs the land in "controversy in this case."

This pronouncement of the Supreme Court stood unchanged when Congress passed the Act of Congress, Chap 53, 23 Stat. L. 26 approved on May 17, 1884. So that while Congress in that Act provided,

"That the Indians or other persons in said "district shall not be disturbed in the possession "of *ANY LANDS* actually in their use or occu- "pation or now claimed by them, but the terms "under which such persons *MAY ACQUIRE* "*TITLE TO SUCH LANDS IS RESERVED* "*FOR FUTURE LEGISLATION BY CON-*

"GRESS." (Chap. 53, Sec. 8, 23 Stat. 26).

It cannot reasonably be said that Congress intended thereby to provide a method of granting or issuing *A TITLE* to such tidelands as might then be in the use or occupancy and possession of Indians or other persons. In support of that contention, it is respectfully pointed out, that Congress in that section made provision for a land office and a method of acquiring title to mines and mineral lands and lands held as mission stations, but therein specified that

"nothing contained in this Act shall be construed
"to put in force in said District the general land
"laws of the United States."

In other words, Congress said, we are permitting you who are now actually upon any kind of land in the Territory, to continue undisturbed in your actual use and possession of it. You may not now acquire title to it, but some day we will make the GENERAL LAND LAWS of the United States applicable to the Territory. As has been frequently pointed out by this Court, there is a very clear distinction between Public Lands and tidelands.

Public Lands or public domain are such lands of the United States as are subject to sale or other disposal under general laws and are not held back or reserved for any special governmental or public purpose. (32 Cyc. 775).. They are lands which the United States owns and of which as such owner, the United States may make disposition when and as to it seems desirable, without any thought of the future

state. Obviously, tidelands in the Territory do not fall within this classification for they are not so held nor so to be disposed.

Shively vs. Bowlby, supra.

Thus if Congress had intended to protect the possession of *public lands* only, it would have used that term instead of the broader term "*any lands.*"

Heckman vs. Sutter 119 Fed. 83,88.

But it is respectfully submitted (and we do not understand this or any other Court to have held to the contrary) that an interpretation of this statue to the effect that Congress intended to and did thereby place tidelands on an equality with public lands would be not only to reverse the whole trend of judicial decision up to that time but also what seems now to be the settled law of tidelands as announced by the Supreme Court in the case of Shively vs. Bowlby, spra. This latter case, while it discusses the decision in Hagan vs. Pollard and explains it, modifies it but slightly. The language of the Court in this respect is as follows:

> "The United States while they hold the coun-
> "try as a Territory, having all the powers both
> "of national and of municipal government, may
> "grant, *for appropriate purposes*, titles or
> "rights in the soil below high water
> "mark of the tide waters. But they have never
> "done so by general laws; and, unless in some
> "case of international duty or public exigency,
> "have acted upon the policy most in accordance

"with the interest of the people and with the "object for which the Territories were acquired, "of leaving the administration and disposition of "the sovereign rights in navigable waters, and "in the soil under them, to the control of the "states, respectively, when organized and admit- "ted into the Union."

The "appropriate purpose" which the Court had in mind as those for which titles or rights might be granted, were, as was said by the Supreme Court in the same paragraph, "the case on an international duty," (obviously, the confirming of a grant by the ceding nation), or "public exigency," that is to say, some purpose for the benefit of the general public. But the act under consideration contemplates neither "an international duty or a public exigency." It seems clear that Congress did not thereby intend to change the rule that there can be no fee in tidelands in a Territory or to provide for the inception of a title to tideland from the United States. What was intended by Congress was to protect Indians or other persons then in actuol use, occupancy or possession from having that use, occupancy or possession disturbed, in order that when the State should ultimately be formed, the original actual possession, maintained however until statehood, might be dealt with by the state itself, following its course in other Territories and states.

8 Encyc. of U. S. Supt. Ct. Rpts. 813,
Shively vs. Bowlby, supra.

Pollard vs. Hagan, supra,
Martin vs. Waddell, 16 Pet. 367,
Mann vs. Tacoma Land Co., supra,
Webber vs. Harbor Br. of Comm. 18 Wall 57, 21 L. Ed. 789.
Hardin vs. Jordan, 140 U. S. 371, 35 L. Ed. 428,
Columbia Canning Co. vs. Hampton, 161 Fed. 60.
McCloskey vs. Pac. Coast Co. 160 Fed. 794,
Sutter vs. Heckman, 119 Fed. 88, 128 Fed. 393,
Carroll vs. Price, 81 Fed. 137.

POINT II.

The possession of tidelands which is protected by the Act of May 17, 1884, (Chap. 53, Sec. 8, 23 Stat. L. 26) is the original actual possession on that date, which has since been actually and continuously maintained by the original 1884 user, occupant, and possessor or by him and his successors in that actual use, occupancy and possession, down to the moment of the controversy. Constructive possession will not satisfy the requirement of the Statute.

The language of the statute itself, already quoted seems perfectly clear, that it is the actual use, occupancy and possession that is protected. Nor indeed do we understand that this or any other Court

has held any other use, occupancy or possession to be sufficient to enable a claimant to invoke the protection of the statute. The statute says that "Indians or "other persons * * * shall not be disturbed *IN THE* "*POSSESSION* of any lands *ACTUALLY* "in their use or occupancy or now claimed by them * * *."

That is to say: That any person who is now (i. e. when the act became a law) really, actually (not constructively) using, occupying and claiming tidelands may continue to use and occupy such tidelands undisturbed so long as he actually uses, occupies and possesses, these lands. The Trial Court arrived at this conclusion and placed upon the section the reasonable and logical and (if the Act is to be effectual) the correct construction, concluding that the word "or" before the words "now claimed," should be read "and" thus following the District Court in Sutter vs. Heckman, 1 Alaska 199-200, and further that the use and occupancy that warranted protection was actual, continued and maintained use and occupancy.

The District Court of Alaska in Carroll vs. Price 81 Fed. 137, 139, says:

> "Under this provision (i. e. the statute quot-
> "ed) all persons *who are in the actual use* and
> "occupancy of tracts of public land in this Dis-
> "trict * * * are protected against intrusion,
> "and their possession cannot be disturbed."

In case of Heckman vs. Sutter, 119 Fed. 83, 88, this Court Said:

"That legislation (act referred to) was suffi-
"cient authority, in our opinion for the decree
"of the Court below securing the complainants
"*in the use and possession of land* which the evi-
"dence shows and the Court found *was held and*
"*maintained at the time of their disturbance*
"*therein by the* defendants and for years there-
"tofore had so held and maintained."

The possession there was actual at the time of the commencement of the suit and it was for that reason that complainants were protected.

On a rehearing of the same case reported in 128 Fed. 393, 397, this Court in discussing the requisite character of use, occupancy or possession said:

"When, as in the case in hand, the reasonable
"exercise of it (the right of fishery) required
"the clearing and use of a small portion of tide-
"lands, there seems to be nothing even unjust in
"protecting such possession against the invasion
"of a rival in the business. Nor does such tem-
"porary concession of such right of occupancy in
"any way involve a concession of any title to
"such tidelands, or *any permanent right of pos-*
session."

Because the complainant in that case was in the actual possession when disturbed, he was protected therein, but the Court was particular to specify it was not to be deemed to hold that the complainant was thereby entitled to a title therein or permanent possession thereof. It seems clear that the Court

meant that the right to protection would be lost by cessation of that actual use or possession.

This Court again in McCloskey vs. Pacific Coast Co., 160 Fed. 794, protected the actual occupancy and possession of the Pacific Coast Co., which had been maintained. There the company performed acts of dominion and ownership with reference to the particular tract of tideland in litigation and used it, drove piling on and around it and placed a log boom about it, excluded people and boats therefrom and otherwise used it and acted during a long period of time in such a manner as to indicate that it was the actual occupant and possessor of the tract at and prior to the time of the interference therewith by McCloskey.

Thus we think it to have been settled by this Court in these and other cases that it is the actual use, occupancy and possession of tidelands in Alaska, continuously maintained from May 17, 1884, to the time of the interference, and that character of use, occupancy and possession only, that will be protected under this statute, and that constructive possession does not satisfy the statute.

POINT III.

The acts of Appellant or of Appellant and its predecessors if any it ever had, on May 17, 1884, or at all, so far as the 113 feet in controversy here are concerned, did not prior to constitute actual possession of the tidelands within the requirements of the statute.

In discussing this point, the claims of Appellant will first be enumerated and what we believe to be the extent of the legal effect and force of those acts, will be considered.

(a) As to appellant's acts:

Appellant's *first* claim as a basis for the claim of possession of this 113 feet, is that Murray located the tract of ground 600 feet square including this ground in question. There is no evidence that Murray ever entered upon the ground. The evidence does show, however, as already pointed out that the 600 feet originally claimed to have been located by Murray, extending inland from the low water mark, has been by Appellant moved upland, its seaward line now being above the line of mesne high tide, and it now claims, 600 feet on the upland under the original location and deeds. It would seem from this that Appellant must be considered to have abandoned its claim of possession of the tideland under that original location, since it moves its upland holdings further inland and take the 600 feet entirely upon upland instead of a part upon the foreshore.

Second:..Appellant claims to have built a wharf upon the tidelands. As already pointed out, this wharf was built by Appellant itself, in the center of the 600 feet tract. Its face was only 80 feet wide, of the 600 foot tract. Its face was only 80 feet wide, of this wharf or approach covered or came within many feet of any part the land in controversy. This

use of this wharf was abandoned and it was allowed to go to ruin and decay. Portions of it collapsed and it was never repaired.

Third: Appellant claims to have driven a couple of piles on the land in question. One of the witnesses testifies that it was driven before 1884, yet the evidence of Webster the man who drove it, shows it to have been driven in 1887 subsequent to the approval of the statute in question, as high upon the shore as the piledriver could go. This is the only improvement or actual occupancy of the ground in question on the part of the Appellant or any one else until Appellant improved it.

Fourth: Appellant claims that the vessels moored at the wharf sometimes projected across the front of this tract of tide land. It is, however, to be borne in mind that while these vessels may have projected *across a portion of the front* of the tract in controversy, the evidence discloses that *none of them lay upon or over the tract itself* inasmuch as they were moored *in deep water at the face* of the wharf and the mooring of a vessel at a wharf in that way does not constitute a use of the tidelands between deep water where it is moored, and the upland abutting thereon.

Fifth: Appellant claims that lines were sometimes during stormy weather carried ashore from a vessel and made fast to some permanent object on the upland. It will be seen that this does not constitute occupancy of the tract, but constitutes the exercise of a littoral right.

Sixth: Apellant claims to have permitted one Messerschmidt to have landed cord wood here, but it is submitted that the evidence shows that the wood was landed upon the upland and that Messerschmidt came to the tract from deep water, passed over the tideland and landed the wood on upland above meane high tide out of the reach of the June tides.

Seventh: Appellant claims that a lease was given to one Davidson to use a part of this tract and that Davidson did use it. It is respectfully pointed out to the Court that this lease itself (See Plaintiff's Exhibit 22, Rec. pp 687) recites not the ownership of the tidelands but the ownership of the uplands and the lease is given in the exercise of the littoral right of the upland owner which may have existed at the time the lease was given, but this does not constitute use or occupancy of land under the Act of May 17, 1884.

Eighth: Appellant claims to have paid taxes upon the larger tract, but there is no evidence that taxes were paid on this particular piece of ground.

Ninth: Appellant claims that the sale of lots by Appellant was the exercise of dominion.

(b) As to effect and force of acts claimed to have been performed by Appellant.

It will be at once noticed that these are really disconnected and isolated acts, all of which with one or two execptions, were performed with reference to or upon the larger tract and at a point or points far

removed from the 113 feet in question. The law requires something more than isolated, disconnected, sporadic acts to constitute any kind of use or possession, not to speak of actual use and possession.

> "**Actual possession of land consists of exercis-**
> "**ing acts of dominion over it, in making the**
> "**ordinary use of it and in taking the profit of**
> "**which it is susceptible.**"
>
> 1 Cyc. 983.

These acts do not measure up to this gauge.

The recording of a notice, of itself does not constitute actual possession though when taken with other *sufficient* acts it might be evidence of *intention* to use. However, *Appellant did not file* the notice and there is no evidence that Murray ever went into possession of the tract himself or by anyone acting for him, or that the possession by Appellant of the wharf was under or pursuant to that notice or any arrangement with Murry. The Circuit Court of the District of Colorado in the case of Latta vs. Clifford, reported in 47 Fed. 614 at page 619, says:

> "If he (claimant) asserts the right of owner-
> "ship over the property, if he does that with re-
> "ference to property of the kind to which men
> "usually do with their own property of a like
> "nature, such as improving it, or using it for any
> "purposes, that is possession. The control, man-
> "agement and direction that he may take with
> "reference to the property, although he has

"never been on it, where it is under his control, "management and direction, may be sufficient to "establish possession. It may be established by "enclosure, by cultivation, by the erection of "buildings or other improvement, or in fact "by any use that clearly indicates its appropria- "tion and actual use by the person claiming to "hold it."

This suit involved the upland. But even assuming for the purpose of the argument only, that it is applicable to tideland, certainly there is nothing in Murray's action which falls within this definition. The driving of a couple of piles together on a boundary can be neither enclosure, cultivation, nor an improvement, nor is it a use of the tract. The docking of vessels in deep water or the carrying of mooring lines to the upland there to be temporarily made fast, even once or twice a month, can scarcely be said to constitute a user of tide lands. Neither the piling of cord wood on the upland by Messerschmidt, nor the construction of the Davidson platform after the Appellee had gone into the possession of the property, was a user or an improvement in the sense used here, or at all, but was merely a temporary exercise of the littoral right.

In the case of Delancy vs. Piepgrass 33 N. E. (N. Y.) 822, 827, Appellant's grantor went into possession of upland bordering 100 feet on shore, using the upland as a shipyard, built two structures, a wharf and a marine railway which were allowed

to decay, and he also procured from the Land Commission of the state, a patent for something over two acres under water on which the railway stood. No other structures were erected for twenty years on this tract. Commenting on this state of facts, the Court said:

> "In any event, it is evident that there was no "permanent appropriation of the soil by Carll, " that is, Appellant's grantors. The structures "were of a temporary character and designed "simply to afford a means of access between the "upland and the navigable water of the Sound "and a title in fee will never be implied from a "user where an easement only will secure the "privilege enjoyed."

The above case seems to be analagous to the case at bar, inasmuch as while Appellant itself never used the particular piece of tideland, it claims to hold it by virtue of its original construction and use of a wharf prior to 1884, which was abandoned in 1894, and allowed to go into ruin and decay as shown by the evidence, the business of the company being transferred to another wharf in a different part of the town of Juneau. Certainly it would seem that Appellant's acts or rather failure to act cannot reasonably be said to constitute actual use or possession of the tract in controversy, nor does it constitute the maintenance of any such possession. In the case at bar the littoral right secured to Appellant the privileges enjoyed. The acts in the exercise of that privi-

lege ought not to be construed as something different or more permanent.

Seabrook vs. Coos Bay Ice Co., an Oregon case, (89 Pac. 417), while dealing with the subject of adverse possession is in point here as defining the character of the possession and improvements necessary to constitute actual possession. The Court says:

> "The only proof is the testimony of Patrick "Hennessey, Superintendent of the Oregon Coal "& Navigation Co., the defendant's grantor, and "he says: The Company had possession of some "tideland there; about all I did was to pay taxes "on it. There were no buildings on it. Some "piling. We received rent money for scows "and a piledriver which tied up there two "or three years ago. These house boats "were used as dwellings. I don't know where "the piles were driven as it was a long time ago. "It is more than ten years since they were "driven. The house boats were not there con- "tinuously. Once in a while they tied up there "during this period. The pilings were not con- "nected with each other in any way. This evi- "dence does not tend to establish adverse pos- "session. (Citing Montgomery vs. Shaver, 40 "Ore. 221, 66 Pac. 823.) Actual occupancy, "pedis possessio, is necessary to constitute such "possession as will ripen into title."

The facts in that case are not so different from those of the case at bar, for here a pile was driven

and an occasional line taken over the tidelands to the upland. As a matter of fact, it would seem that in the Seabrook case the facts were stronger for the original claimants of the land than they are for appellant here.

In the case cited there, Montgomery vs. Shaver, 66 Pac. 923, p. 925, the Oregon Court addressing itself as to what did not constitute actual possession, said:

> "As it relates to the remaining space, the de-
> "fedants drove some piling there in extending
> "out to the old wharf line early in 1882, but have
> "done nothing further in the way of completing
> "the structures to the present time. (i. e., 1901).
> "Part of the space was once used as a ferry slip
> "upon the authority of the defendants for about
> "six months and boats have occasionally tied up
> "to the piling, but otherwise there has been no
> "occupancy or use by defendants. *This comes*
> "*far short* of use to exclusive or adverse pos-
> "session."

This was another case with facts somewhat analogous, in which the Court found that the driving of piling and the occasional use of the tract did not constitute actual or exclusive possession.

The author of the article on "Adverse Possession" in 1 Cyc. says at p. 984 et seq.

> "It is ordinarily sufficient, if the acts of
> "ownership are of such a nature as a party
> "would exercise over his own property and

"would not exercise over anothers. Actuality of "possession is a question compounded of law "and fact and its solution must necessarily de- 'pend upon the situation of the parties, the na- "ture of claimant's title, the character of the "land and the purpose to which it is adapted "and for which it has been used. All the cir- "cumstances must be taken into consideration. "The only rule of general applicability is that "the acts relied upon to establish *possession must* "always be as distinct as the character of the "land reasonably admits of and must be exer- "cised with sufficient continuity to acquaint the "owner, should he visit the land, with a view that "a claim of ownership adverse to his title is be- "ing asserted."

This too, of course, refers to the subject of adverse possession, but at the same time, it states the well considered rule as to what constitutes actual possession, whether in an adverse suit or otherwise and seems to be quite as applicable here. In the case at bar, Appellant had no title whatever, but if ever there, on the 113 feet in question, was there *merely* by virtue of its actual occupation. The fact that Murry may have filed a notice and that any right which he, Murry might have had was conveyed to Appellant by a series of quitclaim deeds, long years afterward and after practically all the transactions in this case had occurred, does not give Appellant title. The

circumstances are, as shown by the evidence and, as admitted by statement of counsel on the argument in this court, (we do not attempt to quote his exact language) that Appellant had no use for this ground for the time, that is, after 1894 and therefore paid no attention to it and put it to no use whatever. In other words, the ground was never used for any purpose whatever by Appellant and it is only now when the land becomes valuable with the increased commercial importance of the City of Juneau, that it has been determined by Appellant to attempt to hold it. None of Appellant's acts with reference to the use, occupancy or possession of this ground were distinct or of such as the character of the tidelands reasonably admits. The land was susceptible of use for wharfing purposes or such uses as those to which Appellee put it. There was no such use by Appellant, nor were Appellant's acts hostile to any one, nor were they exercised in any such manner that they can be said to have any continuity whatever. They were not distinct, were temporary, sporadic and disconnected, doubtful and equivocal in their character and do not, and cannot be said to, indicate an intention to hold the land, and cannot be said to amount to possession.

The mere posting of notices, the surveying of land, the fixing of boundaries, or the payment of taxes, are not in themselves sufficient proof of possession. At best they can only be evidences of an intention to hold land.

1 Cyc. 985 and cases cited in notes.

It was held in Worth vs. Simmons, 28 S. E. (NC) 528, that the fact that the claimant of a large tract of land under a deed had sold and conveyed many small tracts within its boundary, is not sufficient to show actual possession.

The various acts claimed to have been performed by Appellant entirely fail to measure up to the rules of law as to what constitutes actual possession or in fact any kind of possession of the tidelands in question.

POINT IV.

Title to tideland in Alaska may not be acquired by adverse possession under color of title, as

(a) *Title to tideland is held by and in the United States in trust for the future state and the United States will not dispose thereof except for appropriate purposes, such as for the confirming of a grant by the ceding nation or the performance of an international duty, or in case of some public exigency.*

This question is discussed under Point I, and is settled by the case of Shively vs. Bowlby, supra. This Court has repeatedly announced this doctrine. It is restated here for the purpose of the argument.

(b) *Title by adverse possession ripens into a fee and title can be so acquired only in lands of the United States which are susceptible of being bought and sold, i. e., Public lands of the United States.*

"Adverse possession generally speaking, is a "possession of another's lands which, when ac-

"companied by certain acts and circumstances "will vest title in the possessor. The posses- "sion to be adverse must be actual, positive, ex- "clusive and hostile and continued during the "time necessary to create a bar under the statute "of limitations." 1, Cyc. 981.

It is too well established to require the citation of authorities that adverse possession will not run against the United States and that therefore no possession even of upland would establish, on the part of the occupant of land, title as against the United States. But the tidelands in the Territories of the United States are not susceptible of purchase or sale except under extraordinary conditions. The United States, through Congress has ever reserved tidelands for the disposition of the future state, and has never up to the present time disposed of tidelands except for the purpose of carrying out some grant of a ceding country. Shively vs. Bowlby, and other authorities cited, supra. Therefore it seems obvious that since tidelands in the Territory are not for sale and may not be patented, title thereto may not be obtained by adverse possession as against the United States and if not against the United States, then no title at all may be obtained therein.

This court in Tyee Consolidated Mining Co. vs. Langstead, 136 Fed. 124, p. 127, said

"But the rule of the Federal Courts is that the "statute of limitations does not begin to run

"against grantee of the United States until the "issue of patent."

In Redfield vs. Park, 37 L. Ed. 327, it was said that until title passed from the Government there is no title adverse to the entryman.

(c) *Tidelands in the Territory of Alaska are not Public Lands, and may not be sold nor fee in them passed except as specified in (a) above; Therefore no possession of tidelands in the Territory of Alaska can ripen into a fee either against the United States or the future state.*

This Court said in Martin vs. Burford, 181 Fed. 982, p. 985.

"For although as is shown in the opinion of "this Court in the case of Heckman vs. Sutter, "supra, the general land laws of the United "States are not applicable to the Territory of "Alaska, and therefore unless the building and "site in question are a part of some mineral "claim, the legal title to the land is still in the "government. Still the act of Congress, May 17, "1884, recognized and sanctioned *the actual pos-* "*session* and use by an Indian or other person "*of any land* in Alaska so that if it were true "that the defendant had one store building and "site at Farragut Bay they were legally entitled "to sell to plaintiff the one-third interest therein "which would have passed to him the right of

"possession and occupancy of said undivided in-
"terest as against everyone but the United
"States."

In Stark vs. Pierce, 115 U. S. 408, at p. 413, 29 L. Ed. 428, the Supreme Court of the United States says:

"Mere occupancy of the public lands and
"improvement thereon give no vested right
therein as against the United States, and con-
"sequently not against any purchaser from
"them."

If the tidelands in the Territory are not Public Lands, they are not subject to purchase, sale, and patent and no title thereto may be obtained by adverse possession, Then Appellant, no matter how long it may have occupied any part of this tract by itself or others, derived no title thereby, and it can only be protected by reason of actual use, occupancy and possession under the Act of May 17, 1884, and it must stand or fall by that right. The only "true owner" of this tract is the United States. Therefore title to the tideland is not susceptible of being acquired by adverse possession.

(d) *Before a person's possession of a given tract of land can be deemed to be adverse so that the maintenance of that possession for the period prescribed by the Statute of Limitations will ripen into a fee, there must be another and an original, and resisting possession of the identical tract by another person claiming to be the "true owner" to*

which the new claimants possession is opposed, that is adversed. The "true owner" of the tidelands in question has always been the United States, therefore Appellant never could have acquired, nor did it acquire a fee by any occupancy or other act of itself or its predecessors, if any.

The general rule is that title by adverse possession cannot be acquired unless the possession is open, hostile and notorious. In order to make good a claim of title by adverse holding, the "true owner" must have actual knowledge of the hostile claim or the possession must be so open and notorious as to raise the presumption of notice to the world that the right of the "true owner" is invaded intentionally and with the purpose of obtaining title adverse to him, and must be so patent that the owner could not be misled, so that if he remains in ignorance, it is his own fault. 1 Cyc. 997, 5 M. A. L. Sec. 697, pp. 520.

In the case of Pillow vs. Roberts 13 How. 472, 476. the Court said:

> "The statutes of limitations are founded on "sound policy. They are statutes of repose and "should not be evaded by a forced construction. "The possession which is protected by them "must be adverse and hostile to the "true "owner."
>
> *Altschul vs. Quimet*, 58 Pac. 95 p. 97.

It is, of course, necessary before title by adverse possession can be established, to have a "true owner" of the tract who may be deprived of title. The "true

owner" of this tract in question, was and is, and must always have been the United States, and neither Appellant nor its predecessors, nor any of them, could of course, have deprived the United States of its title. Neither Appellant nor any of its predecessors could have been the "true owner," consequently there never was a "true owner" of the tidelands in the sense of that rule against whom title by adverse possession could have been estabilshed, and there is no force in Appellant's contention in reference to its possession or that of Appellee and his acts. If Appellant be not the "true owner" it has the right to the tract only while actually using and possessing it, and while it is not in the actual use and possession of it, another may enter therein as in the case at bar, but such transaction does not fall at all within the meaning of the terms "adverse possession" as defined by the Courts. No matter what may have been Appellant's apparent possession, it was there, if at all, merely by sufferance and during the pleasure of the United States.

Ward vs. Cochran, 150 U. S. 597,

Bracken vs. Union Pac. Railroad Co. 75 Fed. 345,

(e) *There can be no color or claim of title to tidelands in Alaska, inasmuch as the title thereto is in the United States; the rule as to color and claim of title being applicable only to lands to which fee title may be acquired and which are subject to be held by prescription. A notice of location is not color of title.*

This proposition, we think follows from the authorities already cited and requires no special argument, it seeming to be clear that the rule as to color of title can only be applicable to lands to which title may be acquired. Inasmuch as the title to tidelands remains in the United States, there can be no title whatever in them, and consequently, no color of title.

Color of title for the purpose of adverse possession is that which has the semblance of title, legal or equitable, but which is in fact, no title. While it is not essential that the title under which the party claims should be a valid one, the title must be in writing and in the form of a conveyance. A party may not manufacture his own title and an instrument in order to operate as color of title must purport to convey color or claim of title therein or to those with whom he is in privity and must purport to convey land in controversy.

Until long after Appellant had abandoned the use of the entire waterfront, and had allowed buildings and wharf to go into ruin and decay, it never held or had any semblance of title whatever. In fact, it was not until April, 1898, as shown by the records that any conveyance was made to it. In fact, Appellant appears from the evidence to have gone into possession of the wharf, and in fact the upland merely by its actual possession and not under any location notice whatever, and to have used and occupied these during all the time until 1894 without

any written authority or color of title. The location notice claimed by Appellant as color of title does not meet with any of the requirements as to what shall constitute color of title. It is not a conveyance. It is not executed by Appellant, nor by anyone on its behalf, and purports to be on its face, merely a location notice. The authorities all indicate that color of title must be an instrument purporting to convey title. When the other instruments which do purport to convey title are examined it will be found that they were all executed in or subsequent to April, 1898, long after the abandonment of the wharf, and that in each instrument to Appellant it is specified that only such possession or right of possession is conveyed as parties were entitled to at that time, i. e.,

> "Which the parties of the first part now have
> 'or to which now or hereafter they may become
> "entitled to by virtue of any person, estate, or
> "or right in or to the shore and the waters and
> "land under the shores of Gastineau Channel
> "aforesaid."

1, Cyc. 1082-3-5.

Whitney Lumber & Grain Co. vs. Crabtree, 166 Fed, 738, 740.

Woodruff vs. Wallace, 44 Pac. 353, 364.

(f) *The deeds of the Townsite Trustee purporting to convey to Appellant or its grantors, title to soil in Alaska, covered and uncovered by the flow of the tide, that is, a large tract of tidelands including that piece in controversy was ineffective as to*

tide lands as "Appellant would thereby take nothing below the high tide line for the government had not parted with its title."

This point is settled fully and finally in the case of Pacific Coast Company vs. McCloskey, supra, which passes upon the same instrument which Appellant here relies upon.

POINT V.

Possession of tidelands, being susceptible of transfer, may be abandoned. The acts of Appellant disclosed by the evidence constitute abandonment.

That the right of possession of tidelands may be transferred has been settled beyond question in this jurisdiction, the decisions of this Court being repeatedly to that effect. The decisions of this Court above cited and many others settle this proposition. It is obvious that any possession which may be conveyed or transferred may be abandoned.

> "To constitute an abandonment the premises "must be left vacant without intention to re- "claim the possession, and open for occupation "for anyone who enters.
>
> 1 Cys. 4, 6, 7,
>
> *Smith vs. Cushing* 41 Cal. 471, p. 499.

Abandoment is a question of intention and of this intention the jury were to judge in view of all the facts and circumstances in the case.

Meyers vs. Spooner 55 Cal. 257 p. 266.

In the case of Sabaringo vs. Maverick, 124 U. S.

261 at 300, 31 L. Ed. 430, the Supreme Court says:

> "It follows that in cases where the proof on "the part of the plaintiff does not show a posses- "sion continuous until actual dispossession by "the defendant or those under whom he claims, "the burden of proof is upon the plaintiff to "show that his prior possession has not been abandoned."

Appellant's own evidence in the case at bar shows that in 1894 Appellant discontinued use of the wharf site and no longer exercised any of those rights of dominion over it by which it claims to have established its original possession, that is, by the use of the wharf as a landing place for vessels, and it would seem that the burden of proving that its possession had not been abandoned, was upon the Appellant itself. Its evidence as to later acts being merely the permission to Messerschmidt, the lease to Davidson and the payment of taxes on the general tract scarcely comes within the terms of this decision.

This Court, in deciding Lydblom vs. Rochs, 146 Fed. p. 660-4 (after quoting the Sabaringo decision said:

> "The language so used was applied to the "particular facts in the case then before the "Court and it expresses the doctrine that if the "plaintiff's possession is not *continuous* until the "actual dispossession by the defendant or those "under whom he claims, the burden of proof to "rebut the presumption of abandonment is

"placed upon the plaintiff."

The Court then after some further discussion points out that the case it is then considering is not like the Sabaringo case.

> "in which the premises were left unoccupied
> "and possession was not demanded by the former
> "possessor for so long a period as to require
> "proof that he did not intend to abandon it."

It would seem that the language of this Court in this respect fits exactly the facts of the case at bar. For as it appears by the evidence Appellant, through its agents, and servants was aware of the use, occupancy and improvement this tract by Appellee during all these years from 1900 on, and at no time and under no circumstances did Appellant order Appellee to vacate the ground or demand possession of it from him. Under these authorities the burden of proving that it had not abandoned was upon Appellant and we submit that it has failed to do so.

The Circuit Court of Appeals of the Eighth Circuit in Northern Exploration Co., vs. Adams, 104 Fed. 404-5, said in reference to the subject of abandonment:

> "It may be expressed or implied. It may be
> "be effected by a plain declaration of intention
> "to abandon it (water right) and it may be in-
> "ferred from acts or *failures to act* so inconsis-
> "tent with the intention to retain it that the
> "unprejudiced mind is convinced of the renucia-
> "tion * * * ." In the case in hand there was

"no express declaration of the surrender of the "rights which the grantors of Appellee acquired "in 1886 and the issue of abandonment resolved "itself into a question of fact *to be determined* "*by the course of action* which the parties "pursued and the circumstances surrounding "them as they were developed in the evidence."

An examination of the evidence here shows beyond any question that when Appellant built its new wharf at the foot of Main Street in the Town of Juneau, its purpose was to no longer use the tract where it had formerly landed its vessels. This is patent from all its acts and omissoins to act. The circumstances of its allowing the wharf and approach as well as the buildings to go into ruin and decay and its failure to exercise any acts of dominion over the tract in controversy or at the old wharf itself, alone without anything else, are indicative of an intention to abandon it. In any event, no claim was made to the ground and Appellant went so far as to give Appellee permission to construct part of his approach to the gridiron on the land in controversy, over and across a corner of the tract then claimed by Appellant. This, unquestionably called to the attention of Appellant the fact that Appellee was placing permanent improvement upon the tract so that under such circumstances, a failure even at that late day to notify Appellee that Appellant still claimed a right there, must be taken as abandonment. The general proposition as to what consti-

tuates abandonment as stated in Appellant's Brief and presented by argument to the Court seem to be correct statements of the law in the main. However, the facts in this case do not fit Appellant's application thereof, to the law.

POINT VI.

Tidelands which are open, unappropriated, unused, unoccupied and unimproved may be appropriated, used, occupied, possessed and improved by any person, subject always, (1) to the control of the United States under its constitutional right to protect and regulate commerce and navigation. (2) To the dominion, sovereignty and ownership of the future state, and (3) To any existing littoral or riparian rights.

A discussion of this point, seems unnecessary at it has been settled by the Supreme Court of the United States and by this Court in the authorities already cited. It must be apparent from the facts in this case that Appellant, if it ever had had any actual possession of this particular tract in question, which theory Appellee has consistenly resisted, certainly abandoned any such possession in 1894 when it transferred its wharf business from the old wharf to the new wharf further in town. And in April 1900, when James went upon this tract the first time and began his use, occupancy and improvement

of it, there was no one in possession to resist the entry of Appellee or to contest the use or occupancy of the tract.

POINT VII.

Appellant, having abandoned any possession of this 113 feet which it ever may have had, could have no other rights therein or thereover, than were incident to its ownership if it was the owner, of the abutting upland, that is to say, the littoral right or right of access to and from the deep and navigable waters of Gastineau Channel, but this is not a title to the soil below high water mark; it is merely and only an easement.

The authorities already cited cover this point. The first and primary right to the use of tidelands lies in the upland owner, and if Appellant was the owner of the upland abutting upon the tract in controversy in April, 1900, when Appellee went upon this tideland, then it undoubtedly, under the authorities, had the right of ingress and egress over the tidelands between the upland and the deep and navigable waters of Gastineau Channel and we think the evidence in this case plain that it was that right and that right alone which Appellant exercised at all times, and which was in Appellant's mind at the time that the permission was given to Messerschmidt, the lease was given to the Receiver Davidson, and the roadway along the westerly end of the tract was

deeded to the City as a public street. Not only *do the acts themselves point to this*, but the language used in the formal lease signed by the Vice-President and the Assistant Secretary of the Company under the corporate seal, specifically state that it is as owners of the upland that that lease was given and consequently it recognizes its own abandonment and was then and there relying upon its littoral right which was merely an easement.

Columbia Canning Co. vs. Hampton 161 Fed. 60.

POINT VIII.

An owner of upland abutting upon navigable waters may convey away and divest himself of his littoral and riparian rights; and Appellant's deed and dedication of a strip of upland abutting upon the line of mesne high tide along the 113 feet of upland in controversy without reservation, and forever, to the City of Juneau, as a public street, divested Appellant of all its littoral and riparian rights, and easement of access between the upland and the deep and navig able water, across the tideland in controversy.

This question is undoubtedly settled by a determination of this Court in McCloskey vs. The Pacific Coast Company, supra, which involved another piece of the larger tract of tideland lying on the opposite end of the wharfsite tract from the picece here in

question. The Company's deed and dedication of the tract which accompanied the map and which is found in the Record, pages 717, being Appellee's Exhibit "C", shows that Appellant in February, preceding the commencement of this suit, dedicated to the City of Juneau as a public street, which dedication was duly accepted, a strip of upland abutting upon the line of mesne high tide above the tract in controversy, thus cutting off any right which they may have had as littoral owners therein.

POINT IX.

Appellant, having thus abandoned whatever possession of the tideland in question it may have had if any, and having divested itself of its littoral and riparian rights across the foreshore, it is without any right to bring this suit.

This proposition, of course, unquestionably follows the former conclusions and requires no authorities to support it, other than those already cited in the case.

POINT X.

Even if Appellant had had any other right or interest in this tideland in controversy which might have been the subject of this suit, Appellant was not the real party in interest, nor the proper party to bring a suit as, prior to August 15, 1913, it had exe-

cuted deeds, and conveyances and contracts for deeds and conveyances of the foreshore in question.

The law of the Territory of Alaska, is that

> "Every action shall be prosecuted in the name "of the real party in interest except as other- "A. 1913, Sec. 857."

The exceptions do not embrace this case. An examination of the testimony of Ewing, Messerschmidt and Gemmett, and of Plaintiff's Exhibits 24-6-7, and Defedant's Exhibit "B", found respectively on pages 693, 699, 704 and 713, of the Record show that the Appellant had no right to commence this action, having parted with any right, title or interest which it may have had, if ever it had any, in the tideland in controversy.

CONCLUSION,

It would thus seem from a careful consideration of all of the evidence in the case, and the application of settled law in this Circuit to the facts, that the judgment of the Trial Court in this case should be affirmed. Even though Appellant should be found to have once had such a possession of this 113 feet as would have entitled it to remain undisturbed therein provided it maintained that possession, unquestionably the only conclusion to be arrived at from the evidence is that Appellant abandoned and left at least the tract in controversy in 1894, long prior to the time when Appellee went thereon and that appellant never thereafter had any connection therewith

save in the exercise of its littoral right as an upland owner. Of that right Appelant divested itself by conveyance and dedication of a strip of the upland abutting on the foreshore for use as a public street. Further, the evidence shows that the Appellee James, has in good faith and openly, notoriously, and continuously used, occupied, possessed and improved the tract in question, and all of it, from April, 1900, without let or hindrance from the Appellant and that in view of this, it is respectfully submitted that Appellee is the holder and owner and is entitled to the possession of the 113 feet of tideland in controversy, and that he should be allowed to continue undisturbed and uninterrupted in his possession and use thereof, and that the Judgment of the Trial Court should be affirmed.

Dated at Juneau, Alaska, November 17, 1915.

Respectfully submitted,

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